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No. 86-

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

MANUEL BINKER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD A. SHARPSTEIN
(Counsel of Record)
LAURA BESVINICK
SHARPSTEIN & SHARPSTEIN, P.A.
Penthouse One
3043 Grand Avenue
Coconut Grove, Florida 33133
(305) 442-8100

Of Counsel:
MEL S. BLACK
3050 Biscayne Boulevard
Miami, Florida 33137
(305) 573-6622

Counsel for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

WHETHER THE GOVERNMENT MAY BOLSTER THE CREDIBILITY OF ITS KEY WITNESSES BY FOCUSING THE JURY'S ATTENTION DURING TESTIMONY AND CLOSING ARGUMENT ON THE WITNESSES' PLEA AGREEMENT PROMISES TO TESTIFY TRUTHFULLY.

WHETHER THE GOVERNMENT MAY BOLSTER THE CREDIBILITY OF ITS PLEA-BARGAINED WITNESSES BY RELYING ON EVIDENCE THAT IT ACTUALLY "ENFORCED" TWO OF THE WITNESSES' PROMISES TO TESTIFY TRUTHFULLY PRIOR TO TRIAL.

WHETHER THE GOVERNMENT MAY "ENFORCE" A WITNESS' PLEA AGREEMENT PROMISE TO TESTIFY TRUTHFULLY PRIOR TO TRIAL BY THREATENING TO WITHDRAW THE AGREEMENT IF THE WITNESS DOES NOT CHANGE HIS PLANNED TESTIMONY TO INCULPATE THE DEFENDANT.

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The petitioner Manuel Binker respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on August 5, 1986.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 795 F.2d 1218, and is reprinted in the appendix hereto at A1.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 5, 1986, affirming petitioner's conviction dated June 7, 1985. No petition for rehearing was sought. On September 26, 1986, Justice White signed an order extending the time for filing this petition for writ of certiorari to and including November 3, 1986. This petition for a writ of certiorari has been filed and docketed within the time prescribed. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) and Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On April 18, 1985, an indictment was filed charging the petitioner Manuel Binker ("Binker") and five others with unlawfully conspiring to import and to possess with intent to distribute an amount of marijuana in excess of 1000 pounds in violation of 21 U.S.C. §§846 and 963.[1] (R. 1307-15) The eleven-count indictment alleged three distinct importation conspiracies involving two vessels, the "Marenostrum" and the "Harry I", and an aircraft.

Binker was charged in Counts I-IV, which concerned the "Marenostrum" and in Counts V and VI which involved the "Harry I". He was arraigned and entered a plea of not guilty on all counts. (R. 1347)

Thereafter, on May 29, 1985, the Government filed a pretrial memorandum indicating that it would call as witnesses several of Binker's co-indictees. (R. 1533-35) The Government stated that it did not intend to introduce their plea agreements into evidence in its direct case, but warned that cross-examination might "open the door" to their introduction on re-direct. *Id.*

Later that day, counsel for Binker filed several motions *in limine*. One motion sought to redact those portions of the plea agreements which recounted witnesses' promises to testify truthfully and the concomitant right of the Government to verify the truth of their testimony.

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1. Citations to the record on appeal are indicated by (R. ___). Citations to the trial transcript and transcript of the May 30, 1985 hearing are indicated by (V...../.....). The number preceding the "/" symbol is the volume number *as noted on the outside cover of the volume.* (For some reason, the volumes are numbered differently on the inside front page and are out of sequence.) The number following the "/" symbol is the page number of the volume cited.

(R. 1562-66) Binker's counsel argued that this "verification" language permitted the Government improperly to bolster the credibility of its plea-bargained witnesses, by implying that the Government had independently certified the "truth" of these witnesses' stories prior to trial. The court summarily denied Binker's motion regarding the plea agreements and refused to consider redacting the relevant portions of *any* of the agreements. (V.8/80)

Trial commenced on June 3, 1985, in the Eastern District of Louisiana, New Orleans Division. Of all those allegedly involved in the conspiracy, only Binker actually went to trial. The five co-conspirators named in the indictment with him all reached plea agreements with the Government. Two others, named in indictments in other districts, did the same. Another co-conspirator was not indicted and was given formal immunity in exchange for her testimony. All but one eventually testified against Binker at his trial. Indeed, the *only* direct evidence that Binker was ever criminally involved in a conspiracy to import marijuana came from these witnesses—all of whom testified at trial pursuant to their agreements with the Government.[2]

At trial, the Government questioned each plea-bargained witness on direct examination regarding his or her agreement with the Government. The following exchange is typical:

> Ms. Barnes: What did you promise to do in return for being allowed to plead guilty to one charge?

---

2. The other defendants named in the indictment with Binker were Faiz Sikaffy, Miguel Canahuati, Miguel Suriano, Hector Perez, and Curtis Saucier. Co-conspirators William Earle and Robin Rhodes were charged in other districts. Only Saucier did not testify at Binker's trial.

Mr. Black: Objection, Your Honor, its vouching.

The Court: What's that?

Mr. Black: It's vouching for the witness.

The Court: Objection overruled.

The Witness: Tell the truth.

(V.14/224) *Accord* V.10/104; V.14/6; V.14/99; V.13/287; V.13/370. On redirect examination, the Government then introduced into evidence the actual unredacted agreements.[3] In every instance, the defense objected on the grounds that the Government was employing the plea agreement provisions to "vouch" impermissibly for the credibility of its witness.

All of the unredacted agreements, save one, stated:

> This defendant fully understands that he must be truthful and candid at any and every debriefing. The defendant also agrees to appear before any federal grand jury and at any trial and testify completely and truthfully. The government reserves the right to verify by any means it sees fit any statement or testimony given by the defendant.

R. 1394-95.

The one exception was the agreement of Josefina Caporale. The agreement of Caporale, who was granted immunity for her testimony, indicated not only that the Government reserved the right to verify her story, but that *it had already exercised that right* and been satisfied that she was telling the truth:

---

3. The only agreement not entered into evidence was that of Robin Rhodes.

> It is further understood that you shall at all times give complete, truthful and accurate information and testimony. Should it be judged by this office that you have intentionally given false, incomplete or misleading testimony or information . . . you shall be subject to prosecution in this district. . . . In simple terms, your truthful cooperation is vital. Lies or distortions of the truth, on the other hand, could lead to your being prosecuted. *Thus far, we have found what you have told us has been the truth and we have been able to independently corroborate (verify) it.*

(Government Exhibit No. 45) (emphasis added).

To emphasize this point, the Government elicited the following testimony from Caporale when her agreement was introduced:

> BY MR. MONTGOMERY:
>
> Q. What's the date on that letter?
> A. May 1st.
> Q. You had already told the government all that you knew prior to that, hadn't you?
> A. Yes.
> Q. You haven't changed your story since that time?
> A. No.

(V.13/463-64) The defense objected to the introduction of the Caporale agreement just as it had to the introduction of the agreements of the other plea-bargained witnesses. The objection was summarily overruled.[4]

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4. It is worth noting that Caporale was the only one of the plea-bargained witnesses who linked Binker only to the "Harry I." The others linked him to both the "Harry I" and the "Marenostrum." Binker was convicted only of the "Harry I" counts.

The other plea agreement highlighted at trial was that of Miguel Suriano. Suriano had exculpated Binker when he testified before the grand jury. In order to avert that eventuality at trial, the Government sent a message to Suriano in jail threatening to withdraw his plea agreement if he did not incriminate Binker when he testified. Evidence of this "enforcement" of Suriano's plea agreement promise was placed before the jury by stipulation:

> It is stipulated that if Faiz Sikaffy was called to stand in this case, he would testify that Assistant United States Attorney Marilyn Barnes told him on Wednesday, May 29, 1985, that he could tell Miguel Suriano, if you saw him in the jail house that night, that *Marilyn Barnes said he was lying, and as far as she was concerned, Suriano could get ready to go to trial, the government just wasn't going to tolerate such nonsense.*

(V.12/508) (emphasis added).

The Government continued to rely on the plea agreements during closing argument despite frequent defense objections. In its initial closing, the Government argued:

> But, the proposition is being put forward to you that these people are lying, they signed a plea agreement, now they are going to say whatever they have to say. *Ladies and gentlemen, look at those plea agreements, do these plea agreements provide a motive to lie, or do they provide a motive to tell the truth?* These witnesses said that if they lied, they would be charged with perjury, ladies and gentlemen, that's part of their plea agreement. Their plea agreement said if they lied, that plea agreement could be withdrawn, they could stand trial, the deal was off. . .

> And you heard about one such individual, Miguel Suriano, he was in a tough situation, and *he finally came forth and told the truth,* told what he knew.

(V.12/644) (emphasis added).

In final closing, the Government returned to the issue of the plea agreements:

> Now, the one thing that's all going to get them back to where they were facing the original time they were facing, they were told, and you decide from listening to those people on the stand, whether or not they believed it, *if they were lying the deals were off. You have had evidence whether or not the Government enforced that, you decide—*
>
> MR. BLACK: Your Honor, I object to the argument.
>
> THE COURT: Objection overruled.
>
> MS. BARNES: You decide if these people believed it and were acting accordingly. And in fact, lying is one thing that is going to get them right back where they were before.

(V.12/686) (emphasis added).

At the conclusion of closing argument, the defense renewed its objection to the Government's use of the plea agreements. (V.12/695-96) The court simply ignored the objection.

All of the agreements accompanied the jury into the jury room. (V.12/778) After two days of deliberation, Binker was acquitted of Counts I-IV involving the "Marenostrum", but found guilty of Counts V and VI involving the "Harry I." (V.12/723-24) Binker was sentenced to five (5) years imprisonment and a fine of $15,000 on

Count V and fifteen (15) years imprisonment with a fine of $125,000 on Count VI. The prison terms were to run consecutively to each other. (V.11/50)

On August 5, 1986, the United States Court of Appeals for the Fifth Circuit affirmed Binker's conviction. *United States v. Binker*, 795 F.2d 1218 (5th Cir. 1986). (A1) The court twice noted that the Government, in closing argument, had come "perilously close to improper vouching by suggesting that [a] witness should be believed because the government had by other means independently verified his testimony." 795 F.2d at 1225, 1226. (A18, 20) Nonetheless, the court held, in light of "all the circumstances," no reversible error had been shown.

The Fifth Circuit held that under its recent decision in *United States v. Leslie*, 759 F.2d 366 (5th Cir. 1985), *rev'd on other grounds*, 783 F.2d 541 (5th Cir. 1986) (en banc), *petition for cert. filed*, 54 U.S.L.W. 3811 (U.S. June 10, 1986) (No. 85-1961), the admission of the unredacted plea agreements (with the exception of the Caporale agreement) was not error, and the Government's questioning of the witnesses regarding their promises to tell the truth was not improper. 795 F.2d at 1222-23. (A13) The court recognized that the Government's closing argument presented a "more difficult question." *Id.* at 1223. (A14) Nonetheless, the court held that the majority of the Government's statements were permissible as responses to arguments made by the defense, despite the fact that the agreements had been raised first by the Government during direct examination of the plea-bargained witnesses.

The Government's closing reference to the fact that the jury "had evidence whether or not the Government enforced [its plea agreements]," was likewise held to

be permissible as a response to the defense contention that witness Suriano had changed his story because of the Government's threat to withdraw his agreement. The threat itself, the court held, was a "proper attempt[] to enforce [Suriano's] plea agreement[]" and thus did not constitute "substantial governmental interference" with a witness' testimony. *Id.* at 1228. (A25-26)

As to the language in the Caporale agreement indicating that the Government had in fact verified her story, the Fifth Circuit held that it *was* improper but that the issue had not been properly preserved by the defense because the objection made had not been sufficiently specific. *Id.* at 1227. (A21-22)

Accordingly, the Fifth Circuit affirmed Binker's conviction. In light of the court's reliance on the controlling Fifth Circuit authority of *Leslie*, no rehearing was filed.

REASONS FOR GRANTING THE WRIT

The Decision Below Raises Important Questions Never Before Addressed By This Court Regarding The Government's Use Of Plea Agreement Promises To Testify Truthfully To Bolster The Credibility Of Government Witnesses And To Shape The Content Of Their Trial Testimony.

This Court has never ruled on the proper use during trial of Government witnesses' plea agreement promises to testify truthfully. As this case makes clear, it is essential that this Court do so now. The Government here presented its case against the defendant exclusively through witnesses with which it had agreements. It introduced the unredacted agreements into evidence, questioned witnesses regarding their agreements to tell the

truth, and argued to the jury in closing that the agreements indicated the witnesses were telling the truth about the defendant. What is more, in two instances, the Government "enforced" the truth-telling provisions and made clear to the jury that it had done so.

This Court must make clear that such prosecutorial abuse of the plea agreement power will not be condoned. Most defendants in the criminal justice system today give up their right to a trial and plead guilty to reduced charges. Many do so pursuant to plea agreements which require them to testify for the Government when called upon. Typically these agreements state that the Government may withdraw the defendant's plea agreement if it believes that he is not testifying truthfully. Neither the agreements nor any decisions of this Court set out guidelines for permissible Government "enforcement" of a witness' promise to tell the truth. Neither is there any indication of how the Government is to exercise its "right to verify" the "truthfulness" of a witness' testimony prior to trial, in the obvious absence of a jury determination of the facts.

The circuit courts of appeals have attempted to set standards to govern the use at trial of the truthfulness and verification provisions contained in most plea agreements. The court below relied primarily on the binding Fifth Circuit authority of *United States v. Leslie*, *supra*. In *Leslie*, the Fifth Circuit held that the introduction of plea agreements containing truthfulness and verification provisions "standing alone" is not error. The *Leslie* court stressed that the language of the provisions at issue was "neutral" and that the prosecutor had repeatedly cautioned the jury in opening and closing to judge the credibility of the Government's witnesses independently based on the evidence presented. *Id.* at 378.

Despite the limited holding of *Leslie*, the court below affirmed Binker's conviction. Although the language of one of the agreements (Caporale) was far from "neutral" and although the agreements clearly did not "stand alone," the *Binker* court held only that the prosecutor had come "perilously close" to committing error. Of the prosecutor's blatant threat to make Suriano change his testimony, the court said only that it was a permissible "good faith effort [ ] to avert perjury." 795 F.2d at 1229, *quoting United States v. Whittington*, 783 F.2d 1210, 1219 (5th Cir. 1986). (A26)

Appellate courts in other circuits have likewise had some difficulty evaluating governmental reliance on plea agreement truthfulness and verification provisions. Most to consider the issue, however, have held that facts less egregious than those presented here require reversal. Thus, in *United States v. Roberts*, 618 F.2d 530 (9th Cir. 1980), the Ninth Circuit cautioned trial courts to take care in even admitting plea agreements into evidence:

> A strong case can be made for excluding a plea agreement promise of truthfulness. The witness, who would otherwise seem untrustworthy, may appear to have been compelled by the prosecutor's threats and promises to come forward and be truthful. The suggestion is that the prosecutor is forcing the truth from his witness and the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation.
>
> Conveying this message explicitly is improper vouching. (citations omitted).
>
> . . . .

> A trial court should be alert to the problem of vouching before admitting a plea agreement containing a promise to testify truthfully. The court should consider the phrasing and content of the promise to ascertain its implications and decide whether an instruction to the jury would dispel any improper suggestions.

Id. at 536.

As to the use which a prosecutor may make of the promise to testify truthfully once an agreement has been admitted, the *Roberts* court expressed even greater reservations:

> The prosecutor may not tell the jury that the government has confirmed a witness's credibility before using him. (citations omitted) He should be no more able to indicate that the government has taken steps to compel the witness to be truthful. Both of these arguments involve improper vouching because they invite the jury to rely on the government's assessment that the witness is testifying truthfully.
>
> . . . .
>
> The prosecution may not portray itself as a guarantor of truthfulness.

Id. at 537-38.

In the Second Circuit, Judge Friendly eloquently explained the problems posed by governmental reliance on the truthfulness and verification provisions contained in plea agreements:

> Such remarks are prosecutorial overkill. They inevitably give jurors the impression that the prosecutor is carefully monitoring the testimony of the

> cooperating witness to make sure that the latter is not stretching the facts—something the prosecutor usually is quite unable to do; that any significant exaggeration by the witness of what the prosecutor believes to be the truth will cause the latter to refrain from writing the promised memorandum recommending leniency; and perhaps worst of all, that an acquittal may involve serious consequences to the witness by releasing the Government from its promise or even by causing an indictment for perjury. None of our cases supports a summation with respect to a cooperation agreement like that made here.

United States v. Arroyo-Angulo, 580 F.2d 1137, 1150 (2d Cir. 1978) (concurring opinion).

This case is a textbook example of the misuse of plea agreement truthfulness and verification provisions. All of the substantive Government witnesses testified pursuant to agreement. One of the agreements actually stated explicitly that the Government had independently corroborated the witness' story. The Government relied extensively on the agreement provisions in opening and closing arguments as evidence of truthtelling. And, the Government manipulated a witness' testimony by threatening to withdraw his agreement, and stipulated to that fact at trial. This Court should take this opportunity to set precise guidelines for the proper use of plea agreement truthfulness and verification provisions and grant the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

DATED: Miami, Florida
November 3, 1986

Respectfully submitted,

RICHARD A. SHARPSTEIN
(Counsel of Record)
LAURA BESVINICK
SHARPSTEIN & SHARPSTEIN, P.A.
Penthouse One
3043 Grand Avenue
Coconut Grove, Florida 33133
(305) 442-8100

Of Counsel:
MEL S. BLACK
3050 Biscayne Boulevard
Miami, Florida 33137
(305) 573-6622

Counsel for Petitioner

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Manuel BINKER, a/k/a Manolo,
Defendant-Appellant.

No. 85-3614.

United States Court of Appeals,
Fifth Circuit.

Aug. 5, 1986.

Defendant was convicted in United States District Court for the Eastern District of Louisiana, A.J. McNamara, J., of conspiracy to import and possess with intent to distribute more than 1,000 pounds of marihuana, and he appealed. The Court of Appeals, Garwood, Circuit Judge, held that: (1) Government's questioning of its witnesses about their plea agreements was not improper: (2) admission of unredacted plea agreement which stated that Government had independently verified the witness' statements was not plain error; (3) prosecutor's message to one of its plea bargaining witnesses, made a few days before trial, did not violate defendant's due process rights so as to mandate reversal under plain-error rule; and (4) destruction of marihuana seized from vessel did not violate defendant's due process rights.

Affirmed.

1. Witnesses (Key) 377

Government's questioning of its witnesses about their plea agreements did not suggest to jury that Government possessed any extrinsic evidence supporting the witness' statements, and was not improper, where Government merely elicited from each witness a description of the witness' promise to testify truthfully in exchange for reduced charges and Government's promise to inform sentencing judge of the witness' cooperation and where, in each instance, Government offered plea agreement into evidence only on redirect questioning, after defense had cross-examined the witness about the agreement in manner that utilized the agreement to challenge the witness' credibility.

2. Criminal Law (Key) 720(5)

Prosecution was justified in stating in initial portion of closing argument that plea agreements of its witnesses provided incentive to tell the truth, where defense counsel had cross-examined each of the witnesses concerning his plea agreement, suggesting that the witness was lying because of the plea agreement.

3. Criminal Law (Key) 1171.3

Prosecution's assertion in rebuttal in closing argument that "[y]ou have had evidence whether or not the Government enforced that," apparently referring to Government's right under plea agreement to verify statements or testimony given by the plea bargaining witness, was not reversible error, since the argument had legitimate responsive character as to likely effect of alleged threat on witness, though the statement came perilously close to improper vouching by suggesting that the witness should

be believed because Government had independently verified his testimony.

4. Criminal Law (Key) 1043(2)

Complained of language in Government witness' plea agreement which differed from language of other plea agreements to which defendant objected at trial would be reviewed under plain-error rule where, when the subject plea agreement was admitted, defense counsel stated, "Subject to same objection" and failed to specifically object to the differing language in that plea agreement. Fed. Rules Cr.Proc.Rules 51, 52, 18 U.S.C.A.

5. Witnesses (Key) 318

Admission of unredacted plea agreement which stated that, as of time of its execution, Government had independently verified the witness' statements constituted impermissible vouching for credibility of the Government witness.

6. Criminal Law (Key) 1036.2

Admission of unredacted plea agreement which stated that, as of time of its execution, Government had independently verified the witness' statements was not plain error where there was no reference before the jury, by any witness or attorney or the court or otherwise, to that aspect of the agreement, evidence against defendant was extremely strong, and where district court clearly instructed that Government could not vouch for credibility of its witnesses. Fed.Rules Cr.Proc.Rule 52, 18 U.S.C.A.

7. Constitutional Law (Key) 268(8)
Criminal Law (Key) 273.1(2)

Prosecutor's message to one of its plea bargaining witnesses, made a few days before trial, stating that prosecutor thought the witness was lying and could get ready for trial, was proper attempt to enforce the plea agreement and did not violate defendant's right to due process by substantially interfering with the witness' free and unhampered choice to testify. U.S.C.A. Const.Amends. 5, 14.

8. Constitutional Law (Key) 268(8)
Criminal Law (Key) 1037.1(3)

Prosecutor's message to one of its plea bargaining witnesses, made a few days before trial, stating that prosecutor thought the witness was lying and could get ready for trial, was not egregiously improper and did not violate defendant's due process rights so as to mandate reversal under the plain-error rule. U.S.C.A. Const.Amends. 5, 14; Fed.Rules Cr.Proc.Rule 52, 18 U.S.C.A

9. Constitutional Law (Key) 268(5)

Government's destruction of marihuana seized aboard vessel did not violate due process rights of defendant who was charged with conspiracy to import and to possess with intent to distribute more than 1,000 pounds of marihuana, where the evidence was destroyed after original indictment resulting from arrest of those aboard the vessel was dismissed at request of United States attorney to protect informant, Drug Enforcement Administration procedure for testing chemical composition of the evidence seized was sufficiently accurate to render nugatory the exculpatory value of preservation, and where defendant had opportunity to cross-examine all the witnesses who testified

that the evidence seized aboard the vessel was marihuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963; U.S.C.A. Const. Amends. 5, 14.

Richard A. Sharpstein, Coconut Grove, Fla., Melvin S. Black, Miami, Fla., for defendant-appellant.

Marilyn Barnes, Asst. U.S. Atty., John Volz, U.S. Atty., Joseph I. Giarrusso, Jr., Asst. U.S. Atty., New Orleans, La., for plaintiff-appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before GARWOOD and HILL, Circuit Judges, and WILL,* District Judge.

GARWOOD, Circuit Judge:

Appellant Manuel Binker appeals his conviction of conspiracy to import and to possess with intent to distribute more than one thousand pounds of marihuana. Binker was indicted with five others who pleaded guilty prior to trial. Counts I through IV of the indictment concerned a scheme to import marihuana on the vessel MARE-NOSTRUM; counts V and VI concerned a scheme to import marihuana aboard the vessel HARRY I. Binker was acquitted on counts I through IV, but was convicted on counts V and VI for the conspiracy involving the HARRY I.

Binker raises three claims of error on appeal. First, he objects to the government's use of the plea agreements of the co-conspirators that testified against him. He also

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*District Judge of the Northern District of Illinois, sitting by designation.

claims that the government unlawfully intimidated one witness to testify against him. Finally, Binker challenges the admission of testimony concerning evidence seized aboard the HARRY I, because this evidence was destroyed prior to trial. Finding Binker's arguments present no reversible error, we affirm his conviction.

Facts and Proceedings Below

On June 23, 1984, a patrolling United States Coast Guard cutter came across the disabled vessel HARRY I, which was anchored on the high seas taking on fuel from a smaller vessel beside it. The HARRY I indicated that its fuel had been contaminated by water. After receiving permission from the master of the HARRY I, the Coast Guard boarded the vessel and obtained documents denoting that mangoes were the ship's only cargo and that the HARRY I had departed from Haiti over a month before. The Coast Guard searched the vessel and discovered 405 bales of marihuana in the cargo hold camouflaged by a load of rotting mangoes. In addition, they initially found thirteen persons aboard, all of South American nationality, and eventually discovered a fourteenth person, an American named Robin Rhodes.

The HARRY I was seized and escorted to Key West, Florida, where the vessel, its contents, and the persons aboard were turned over to the custody of the Drug Enforcement Administration (DEA). The DEA's search of the HARRY I produced 329 bales of marihuana weighing approximately 16,450 pounds (there was no explanation for the discrepancy in the number of bales), some rotting fruit, and straw goods. Ten random samples taken from the marihuana and one large bale were sent to the DEA lab for testing. All of the marihuana seized from the

HARRY I, including the lab samples, was destroyed prior to trial. A DEA chemist testified at trial that he examined the bale and the samples and found that they were marihuana.

Rhodes and the thirteen other persons found aboard the HARRY I were arrested upon their arrival in Florida. Rhodes decided to cooperate with the government, and the information he provided eventually led to Binker's indictment. On November 15, 1984, Binker and others were indicted for conspiracy to import in excess of one thousand pounds of marihuana aboard the vessel HARRY I and conspiracy to possess with intent to distribute the marihuana. A final superseding indictment was returned against Binker and five others on April 18, 1985, which charged Binker under counts V and VI with the HARRY I conspiracy and, in counts I through IV, charged him with conspiracy to import and conspiracy to possess with intent to distribute in excess of one thousand pounds of marihuana aboard the vessel MARENOSTRUM, and with the substantive counts of importation of and possession with intent to distribute the marihuana. The other defendants named in this indictment and co-conspirators charged in other districts all pleaded guilty, leaving Binker the only defendant to proceed to trial. Most of the evidence against Binker came from co-conspirators who testified pursuant to plea agreements.

Faiz Sikaffy, Binker's partner in several ostensibly legitimate businesses, was a primary witness for the government. Sikaffy testified that he was a partner with Binker in marihuana smuggling ventures involving the MARENOSTRUM and the HARRY I.[1] Binker and Sikaffy

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1. Because Binker was acquitted on the counts concerning the MARENOSTRUM, we will for the most part describe the testimony only as it relates to the HARRY I.

purchased the HARRY I, a refrigerated vessel, initially for the purpose of importing seafood. Sikaffy testified that in March 1984 he and Binker decided to use the vessel to import marihuana. Sikaffy's role was to transport the marihuana, while Binker's was to sell it. Sikaffy hired an airplane pilot, William Earle, to maintain aerial watch over the HARRY I and to communicate with the ship's captain. Miguel Canahuati's role was to perform various odd jobs concerning the importation, including a trip to Colombia to check on the crop. Rhodes was the ship engineer of the HARRY I, and also bought smaller boats to carry the marihuana from the HARRY I to the United States. Sikaffy testified that Binker furnished some of the money used to purchase the small boats, through a courier named Miguel Suriano.

Sikaffy further testified that in May 1984 the HARRY I was anchored in Haiti prepared to set sail and to receive the load of marihuana from a Colombian ship at sea. At that time, Binker, Sikaffy, Earle, and Suriano traveled to Haiti to prepare for the departure of the HARRY I. In Haiti, Binker and Suriano bought mangoes and straw products to hide the marihuana load. After the HARRY I left Haiti, it met with the Colombian ship and received the marihuana.

Sikaffy then joined other co-conspirators in Louisiana because, under the original plan, the HARRY I was to be off-loaded about two hundred miles from the coast of Louisiana. Binker apparently returned to Florida. Because Sikaffy and others began to suspect that one of the participants was an informant, they changed their plans and decided to meet the HARRY I off the coast of Florida. Sikaffy described ship-to-shore telephone calls from the HARRY I to him and to Binker during this

time, which the government corroborated with telephone records and other witnesses. Sikaffy explained that he and Binker were able to arrange for the off-loading of some of the marihuana onto the vessel SEACRUST. This marihuana eventually was sold to Hector Perez. Before they could unload any more of the marihuana, the HARRY I and its crew were seized. Sikaffy stated that he and Binker then obtained an attorney for Robin Rhodes and the crew of the HARRY I. This attorney was paid by Josefina Caporale, Sikaffy's personal secretary, with money that she obtained from Binker.

Sikaffy's description of the HARRY I smuggling scheme was corroborated by other witnesses. Perez testified that in March 1984 he met with Binker in Florida to discuss the importation. Perez explained that he initially went to Louisiana to await the arrival of the marihuana, but after the difficulties arose with off-loading there, he returned to Florida. Perez was subsequently informed that the marihuana had been unloaded and was available. He received approximately 6,800 pounds of marihuana for which he made several cash payments to Binker.

Suriano testified that when Binker and Sikaffy purchased the HARRY I they informed him of their intention to use it for marihuana importation. He also stated that he was in Haiti during the preparations for the voyage of the HARRY I, and that he and Binker bought the mangoes and straw products to conceal the marihuana aboard the HARRY I. He further testified that he received money from Binker, which he delivered to Rhodes for the purchase of the small boats.

Earle testified that he flew to Haiti and gave Binker and Suriano cash for the purchase of the mangoes and

straw products. According to Earle, Binker explained to him that the smell of the mangoes would hide the smell of the marihuana, and that the straw products would take up a lot of space without weighing much. Earle also described his aerial observation of the meeting at sea between the SEACRUST and the HARRY I. Earle stated that he was accompanied by an employee of Binker's, and that he heard the employee call Binker to report on the succesful rendezvous of the two vessels when the marihuana was off-loaded. Furthermore, Earle was present at meetings between Sikaffy and Binker when they discussed the importation and observed Binker pay Sikaffy several hundred thousand dollars in cash.

Canahuati described his trip to Venezuela and Colombia to inspect the marihuana that was to be imported on the HARRY I. He also recounted his subsequent trip to Florida to report to Sikaffy and Binker about the marihuana.

The testimony of Caporale, Sikaffy's personal secretary, corroborated some of Sikaffy's account of Binker's involvement in the HARRY I importation scheme. She related that she received ten thousand dollars cash from Binker and delivered it to the attorney for the crew of the HARRY I. She also stated that on previous occasions Binker had delivered large sums of cash to Sikaffy.

Each of these witnesses testified pursuant to a plea agreement, which the government introduced into evidence over appellant's objection. The government presented further evidence corroborating Binker's involvement in the HARRY I smuggilng venture, including Rhodes' account of meetings with Sikaffy and Binker and of the events that occurred while he, Rhodes, was aboard the HARRY I. Although Rhodes testified pursuant to a plea

agreement, the government did not offer his agreement into evidence.

After the close of the government's case, several character witnesses testified on behalf of Binker. Then, Binker took the stand and explained that he had been in the seafood business with Sikaffy but had known nothing about the marihuana importation. Binker testified that he purchased the mangoes and straw products as a favor to Sikaffy and that he received several phone calls from the crew of the HARRY I when the vessel developed engine problems. Binker denied knowledge of the marihuana aboard the HARRY I, but stated that he referred Sikaffy to a lawyer when he learned that the HARRY I had been seized.

Binker was convicted of conspiracy to import and to possess with intent to distribute in excess of one thousand pounds of marihuana in violation of 21 U.S.C. §§ 846, 963. On count V, Binker was sentenced to five years' imprisonment and fined $15,000. He received a fifteen-year sentence on count VI to run consecutively with his count V sentence, plus a fine of $125,000.

Discussion

Plea Agreements

Binker contends that the government's use of its witnesses' plea agreements constituted impermissible vouching for the credibility of those witnesses. He argues that the admission of the Caporale plea agreement standing alone impermissibly vouched for her credibility. He also claims that the admission of the plea agreements of five other witnesses (Sikaffy, Perez, Suriano, Earle, and Canahuati) in connection with the government's questioning and closing argument was improper vouching for the cred-

ibility of the government witnesses. The latter five plea agreements provide (1) that the witness testify truthfully, (2) that the witness will be prosecuted for false statements or perjury if he fails to testify truthfully, and (3) that the prosecution retains the right to verify the statements and testimony given by the witness. The Caporale agreement, however, contains significantly different language, asserting that the government had independently verified the truth of her statements.[2]

We first address Binker's challenge concerning the district court's admission of the unredacted plea agreements of Sikaffy, Perez, Suriano, Earle, and Canahuati. The government's attempt to bolster a witness by vouching for his credibility constitutes error when the prosecutor's statements "might reasonably have led the jury to believe that the prosecutor possessed extrinsic evidence, not presented to the jury, that convinced the prosecutor of the defendant's guilt." *United States v. Leslie,* 759 F.2d 366, 378 (5th Cir.1985) (citations omitted), *rev'd on other grounds,* 783 F.2d 541, 542 n. 1 (5th Cir.1986) (en banc) (reinstating panel opinion concerning admission of the plea agreements), *petition for cert. filed,* 54 U.S.L.W. 3811 (U.S. June 10, 1986) (No. 85-1961). The district court's mere

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2. The relevant provision of Caporale's plea agreement states:

> "It is further understood that you shall at all times give complete, truthful and accurate information and testimony. Should it be judged by this office that you have intentionally given false, incomplete or misleading testimony or information, or have otherwise violated any provision of this agreement, you shall be subject to prosecution in this district for any federal criminal violation of which this office has knowledge and jurisdiction including, but not limited to, perjury and obstruction of justice. . . . *Thus far, we have found that what you have told us has been the truth and we have been able to independently corroborate (verify) it.*" (Emphasis added.)

admission of the plea agreements is not erroneous because the three above-mentioned provisions therein are virtually identical to those contained in the plea agreements the admission of which we approved in *Leslie*. *Id.* at 377-78. Recognizing that these agreements standing alone are not improper, Binker claims that the government's focus on the agreements in its direct and redirect examination of the witnesses and in its closing argument indicated to the jury that the prosecutors had verified the witnesses' accounts and believed that they were telling the truth.

[1] Having reviewed the record, we determine that the government's questioning of the witnesses about their plea agreements was not improper. The government merely elicited from each witness a description of the witness' promise to testify truthfully in exchange for reduced charges and the government's promise to inform the setencing judge of the witness' cooperation. In each instance, the government offered the plea agreement into evidence only on redirect questioning, after the defense had cross-examined the witness about the agreement in a manner that utilized the agreement to challenge the witness' credibility. Although *Leslie* addressed only the admission of the written agreements, we find that the witnesses' limited reiteration of the promises in the plea agreements in this instance does not amount to improper vouching under the standard of *Leslie*, because the questioning did not suggest to the jury that the government possessed any extrinsic evidence supporting the witnesses' statements.[3]

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3. Binker also challenges the government's questioning of Rhodes about his plea agreement, although the agreement was not offered or admitted into evidence. We find that the government's questioning of Rhodes about the content of his plea agreement was not impermissible vouching for the reasons described above.

The government's closing argument, however, presents a more difficult question. In its initial or opening closing argument to the jury, the government responded to the defendant's suggestions, made in cross-examination, that the witnesses were lying because they had signed plea agreements. The government argued in this connection:

> "Ladies and gentlemen, look at those plea agreements, do these plea agreement provide a motive to lie, or do they provide a motive to tell the truth? These witnesses said that if they lied, they would be charged with perjury, ladies and gentlemen, that's part of their plea agreement. Their plea agreement said if they lied, that plea agreement could be withdrawn, they could stand trial, the deal was off. Ladies and gentlemen, is that a motive to lie, or is that a motive to tell the truth, to testify truthfully.
>
> "And you heard about one such individual, Miguel Suriano, he was in a tough situation, and he finally came forth and told the truth, told what he knew.
>
> ". . .
>
> "If [these witnesses] really wanted to lie, if they were out there testifying to save their own skins, why didn't they really cook up a story, no way out? Because they were telling the truth, ladies and gentlemen, that's why, they only said what they knew."[4]

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4. No objection was made to any of this argument until after the conclusion of both the defendant's closing argument (during which there was a recess between the arguments of the two defense counsel) and the government's rebuttal closing argument. Defense counsel then made the following objection apparently directed to the government's initial or opening closing argument, *viz*:

(Continued on following page)

In his closing argument, appellant's counsel argued that every witness who testified pursuant to a plea bargain "should be subjected to perjury, because we've heard, each and every one of them, change their story and lie from that witness stand." Defense counsel also argued that "possibly next spring Mr. Sikaffy [a government plea bargain witness] will be sitting in Honduras." Counsel suggested the witnesses were coerced by the government.[5] In the government's rebuttal to the appellant's closing

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Footnote continued—

> "Okay, the Government argued the truthful provision, the requirement of the truthfulness in the plea agreement a number of times and I consider that to be vouching and I object to all those references.
>
> "Finally, at one point there was a phrase where Mr. Montgomery [government counsel] said because they were telling the truth, I consider that to be vouching. So, I would object to those, all those references to the plea agreement in vouching, in terms of final argument."

The court never ruled on this objection, and (apart from the objection itself) was never asked to; nor did defense counsel make any motion requesting any relief (such as an instruction to the jury or a mistrial) in connection with the making of this objection.

5. Defense counsel's argument in this connection included the following:

> "And you have got to ask yourselves whether it was perhaps, a little coercion, not necessarily Mrs. Barnes, not necessarily the agents, but maybe there is a combination of things. When people are threatened with long periods of time in jail for their activity, they certainly come to a point where they say to themselves gee, what do these people want to hear, what can I give them? And they keep saying well, there is only one of you left, there is Binker left. And Binker, we think had something to do with this, but we need some help because we don't have anything. . . .
>
> ". . .
>
> ". . . [T]hey are all looking for favors, or favorable testimony to the Court and stuff, they cooperated that they did the little bit as far as convicting another person. So, there is a lot of motive for them to change their story."

argument, the government again addressed the witnesses' plea agreements:

> "[Government counsel] Now, the one thing that's all going to get them back to where they were facing the original time they were facing, they were told, and you decide from listening to those people on the stand, whether or not they believed it, if they were lying the deals were off. You have had evidence whether or not the Government enforced that, you decide—
>
> "MR BLACK [defense counsel]: Your Honor, I object to the argument.
>
> "THE COURT: Objection overruled.
>
> "[Government counsel] You decide if these people believed it and were acting accordingly. And in fact, lying is one thing that is going to get them right back where they were before."

The prosecution's role in closing argument is generally limited to assisting the jury in "analyzing, evaluating, and applying the evidence." *United States v. Shaw*, 701 F.2d 367, 390 (5th Cir.1983) (quoting *United States v. Dorr*, 636 F.2d 117, 120 (5th Cir.1981)), *cert. denied*, 104 S.Ct. 1419 (1984). The prosecutor may argue the conclusions that the jury should draw from the evidence, but he may not express his personal opinion on guilt or innocence or the credibility of the witnesses. *Id.; United States v. Garza*, 608 F.2d 659, 662-63 (5th Cir.1979). A prosecutor certainly "may not make explicit personal assurances of a witness's veracity." *Leslie*, 759 F.2d at 378. Nevertheless, when the defense counsel attacks the credibility of a government witness, the prosecutor is entitled to make a fair response in rebuttal. *United States v. Nixon*, 777

F.2d 958, 972 (5th Cir.1985); *United States v. Nanez,* 694 F.2d 405, 410 (5th Cir.1982), *cert. denied,* ..... U.S. ....., 103 S.Ct. 1884, 76 L.Ed.2d 813 (1983); *see also United States v. Young,* 470 U.S. 1, 105 S.Ct. 1038, 1044-46, 84 L.Ed.2d 1 (1985).

The application of these principles to comments concerning a witness' plea agreement can be difficult. Typically, the fact that a government witness has made a plea bargain with respect to the events at issue is a matter which the defense desires to heavily emphasize as adversely affecting the witness' credibility, giving him an ulterior motive to falsely implicate the defendant. If the terms of the plea bargain are proper, as we held in *Leslie,* then certainly it is appropriate for the government to *respond* by asserting that the agreement provides an incentive to tell the truth rather than to lie. Nor is it reasonable that the government be made to appear as if it were hiding the plea agreement or its terms by being prevented from mentioning them until they are first brought out by the defense, at least assuming that the defense does not waive the right to bring those matters out. Normally, if the agreement is gone into, all proper terms relevant to the witness' motive may be disclosed. The greatest difficulty is presented by the provision that the government has the right to verify the witness' testimony. We sustained such a provision in *Leslie.* In this connection, the harm to be avoided is the jury's belief that the government in not withdrawing the witness' plea agreement has relied on evidence not admitted at trial. Therefore, the prosecution may not initiate the claim that the witness must be telling the truth or otherwise his plea agreement would have been withdrawn. Moreover, once the defense has suggested that the witness is prompted to lie by the existence of the plea agreement, the prosecution may not

indicate its belief in the witness' veracity any more than is reasonably necessary under the circumstances in responding to the defense; the government may then suggest that the witness should be believed, but *not* because the government has independently verified the witness' account.

[2] In the present case, appellant's counsel cross-examined each of these five witnesses concerning his plea agreement, suggesting that the witness was lying because of the plea agreement. The prosecution was accordingly justified in stating in the initial portion of its closing argument that the plea agreements provided an incentive to tell the truth. Then, appellant in his closing argument countered that the government witnesses were lying and suggested that the witnesses had succumbed to threats or coercion on the part of the government under the plea agreements. In rebuttal, the prosecution properly suggested that, contrary to the defense arguments, the plea agreements gave the witnesses a motive to testify truthfully.

[3] However, one assertion in the prosecution's rebuttal is more questionable. This is the statement "[y]ou have had evidence whether or not the Government enforced that," apparently referring to the government's right under the plea agreement to verify statements or testimony given by the plea bargaining witness. This comes perilously close to improper vouching by suggesting that the witness should be believed because the government had by other means independently verified his testimony. Nevertheless, in the present case there is a special context in which this remark must be considered. As noted below in the discussion of appellant's claim of witness intimidation, *appellant* had put in evidence before the jury stipu-

lated testimony of Sikaffy that Assistant United States Attorney Barnes had, some days before trial, suggested to Sikaffy that he tell Suriano, also a plea bargaining witness, that Barnes thought Suriano's grand jury testimony was false and inferred that the government might withdraw from its plea agreement with Suriano on that account. In his grand jury testimony, Suriano had, among other things, said, contrary to his trial testimony, that he did not know whether Binker was aware that the purpose o. .he mangoes and straw products was to conceal the marihuana on the HARRY I. This inconsistency was of course brought out at trial. The defense in its closing argument relied on this, and on the above-referenced stipulated testimony of Sikaffy concerning what Barnes told him, in order to discredit the veracity of Suriano's trial testimony.[6] The prosecution's referenced remark in its rebuttal argument can thus be seen as replying to the argument that the Barnes "threat" made Suriano testify falsely at trial, by urging that its tendency would rather be to influence him to testify truthfully. In this light, the argument has more of a legitimate responsive character as to the likely effects of such a statement on Suriano, as opposed to being an improper claim that Suriano's trial testimony should be believed because the government has evidence, not before the jury, showing that, regardless of Suriano's motivation, what he related at trial was factual.

Furthermore, an improper argument by the prosecution does not require reversal of a conviction unless

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6. When questioned about this, Suriano testified that Sikaffy had told him (Suriano) prior to trial and after Suriano's grand jury testimony "that he [Sikaffy] thought I way lying and he said, you might as well tell the truth" and that Suriano then decided to do so and "talked to Miss Barnes about it." Suriano denied that somebody from the government told him his plea agreement was in jeopardy because they thought he had lied to the grand jury.

it prejudicially affected substantial rights of the defendant. *Nixon*, 777 F.2d at 972-73; *Garza*, 608 F.2d at 663. In assessing the degree of prejudice resulting from a prosecutor's closing argument, we may consider the strength of the evidence against the defendant and the district court's instructions to the jury. *United States v. Phillips*, 664 F.2d 971, 1031 (5th Cir.1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). Although the district court overruled appellant's objection to the rebuttal argument and thus did not provide an immediate curative instruction, *see Shaw*, 701 F.2d at 391; *Dorr*, 636 F.2d at 121, the court had explained to the jury prior to the closing arguments that "what the lawyers say is not evidence." The court admonished the jury to rely on their own recollections of the evidence presented at trial. *Phillips*, 664 F.2d at 1031. In its charge to the jury shortly following the closing arguments, the court instructed the jury that a plea agreement's requirement that the witness testify truthfully does not mean that the witness has in fact testified truthfully and that the government may not vouch for the credibility of its witnesses. Moreover, the evidence against Binker was compelling.

While the government in its closing argument came perilously close to improper vouching by suggesting that the witness should be believed because the government had by other means independently verified his testimony, we conclude that, under all the circumstances, the government's closing arguments present no reversible error.

We now turn to Binker's challenge to the admission of the Caporale plea agreement. In denying Binker's motion for reconsideration of his motion for new trial, the district court found that Binker had failed to timely and specifically object to the distinctive verification language in the Caporale agreement.

On May 30, 1985, Binker filed a pretrial motion *in limine* requesting that all evidence of the plea agreements be redacted and modified to avoid any reference to the following requirements: that the witness testify truthfully, that the witness would be prosecuted for perjury if he failed to testify truthfully, and that the prosecution retained the right to verify the statements of the witnesses. Appellant claimed that the government's use of evidence of these three requirements would improperly vouch for the credibility of its witnesses. Appellant attached to his motion *in limine* the plea agreement of Rhodes, which was never offered into evidence. This agreement had the same provisions as did the other agreements, except for Caporale's, and did not have the objectionable vouching language of the latter (*see* note 2, *supra*). Although it is not clear exactly when the defense counsel received the Caporale agreement, the prosecution and the defense agree that the document was provided to the defense sometime during the period from May 30, 1985, to June 2, 1985. The trial began on June 3. Although appellant may not have received the Caporale agreement until after he had argued his pretrial motion, he failed to bring the distinctive language of the Caporale agreement to the district court's attention at any time prior to or throughout the trial. Appellant's counsel objected to the admission of each plea agreement, often explicitly renewing his pretrial objection. When Caporale's plea agreement was admitted into evidence, appellant's counsel stated: "Subject to the same objection." Appellant now asserts that the district court did not permit him to make specific arguments when objecting to the plea agreements. However, appellant's counsel never apprised the district court that he was offering any objection different from that raised in the motion *in limine*. Finally, Binker again challenged the

plea agreements in a motion for new trial, but failed to attach a copy of the Caporale agreement or to in any way refer to its distinctive language. Binker's first reference to the offensive language of the Caporale agreement was in his motion for reconsideration of the denial of his motion for new trial. Until Binker's motion for reconsideration, his recurring objections focused on the three provisions common to all six plea agreements without distinguishing the Caporale agreement.

[4] The district court did not err in finding that Binker failed to specifically object to the Caporale agreement as required by Rule 51 of the Federal Rules of Criminal Procedure.[7] Because Binker's complaint of the distinctive verification language in the Caporale agreement is significantly different from his complaint as to the other plea agreements, he was obliged to inform the district court of the specific ground of his objection to warrant exclusion or redaction of the Caporale agreement. We therefore review the admission of this agreement under the plain error standard. Fed.R.Crim.P. 52; *United States v. Canales,* 744 F.2d 413, 431 (5th Cir.1984). Plain error supports reversal only if "the error is so obvious that our failure to notice it would seriously affect the fairness, integrity, or public reputation of judicial proceedings and result in a miscarriage of justice." *Canales,* 744 F.2d at 431 (citations omitted).

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7. Fed.R.Crim.P. 51 provides:

"Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor. . . ."

[5, 6] The Caporale plea agreement states that, as of the time of its execution, the government had in fact independently verified the witness' statements. Therefore, the admission of the unredacted plea agreement constituted impermissible vouching for the credibility of the government witness. Nevertheless, we find that reversal is not warranted under the "plain error" rule. To begin with, at no time was there ever any reference whatever before the jury, by any witness or attorney or the court or otherwise, to this aspect of the Caporale agreement. It simply played no part at all in the trial. It appears obvious that it was something all concerned wholly overlooked. Further, the evidence against Binker was extremely strong. Caporale's testimony merely corroborated testimony given by the other government witnesses. Caporale lacked the direct involvement and intimate knowledge of the conspiracy exhibited by the other government witnesses. Her statements concerning payments made by Binker to Sikaffy and to the attorney hired for the crew of the HARRY I were confirmed by Sikaffy, Perez, and Earle.[8] Furthermore, the district court clearly instructed the jury that the government could not vouch for the credibility

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8. Appellant contends that Caporale's testimony must have been crucial, because she did not testify about the MARENOSTRUM, while the other witnesses who tied appellant to the HARRY I likewise also implicated him respecting the MARENOSTRUM. The jury acquitted appellant on the MARENOSTRUM counts, and appellant thus reasons that the jury disbelieved all the government's witnesses who tied him to the HARRY I except Caporale. This theory is not persuasive. As noted in the text, Caporale's testimony about the HARRY I was not particularly extensive, and there was a great deal of other evidence tying appellant to the HARRY I. Further, Caporale did give some, though lesser, testimony respecting the MARENOSTRUM. Finally, the real difference between the MARENOSTRUM and the HARRY I was that when the customs agents searched the former on its arrival in Louisiana they found no marihuana, and the MARENOSTRUM accordingly was not seized and *no* marihuana was *ever* recovered from it.

of its witnesses. Although before its admission in evidence the Caporale plea agreement should have been redacted to eliminate its recital that the government had in fact independently verified Caporale's story as being the truth, the failure to do so did not result in a miscarriage of justice or seriously affect the fairness of the proceedings here. Consequently, reversal is not mandated under the plain error rule.

Lest the message of this opinion be misconstrued, we reiterate our statements in *Leslie* that any attempt by a prosecutor to bolster a witness by vouching for his credibility constitutes error if the statements made "might reasonably have led the jury to believe that the prosecutor possessed extrinsic evidence, not presented to the jury, that convinced the prosecutor of the defendant's guilt," and that a prosecutor "may not make explicit personal assurances of a witness's veracity." *Leslie,* 759 F.2d at 378. Although we have concluded here that, under all the circumstances, the prosecutor's closing argument and the introduction of the improperly unredacted Caporale plea agreement do not constitute reversible error, this is not to be interpreted as warranting use of plea agreements to vouch for the credibility of a witness contrary to our above-noted admonitions in *Leslie.* Prosecutors have a responsibility to refrain from such conduct and we assume that they will do so.

Witness Intimidation

Binker also contends that the prosecution violated his right to due process by substantially interfering with a witness' free and unhampered choice to testify. As noted, Suriano, an alleged co-conspirator, entered a plea agreement with the government. Before the grand jury, Suri-

ano testified that he did not know whether Binker was aware of the purpose of the mangoes and straw products in camouflaging the marihuana aboard the HARRY I. Yet, at trial Suriano explained that he had testified falsely at the grand jury to protect Binker, and that he and Binker had purchased the mangoes and straw products for the purpose of concealing the marihuana. The prosecution and the defense agreed to the following stipulation, which the defense read to the jury after the government had rested and as a part of the defense case:

> "It is stipulated that if Faiz Sikaffy was called to the stand in the case, he would testify that Assistant United States Attorney Marilyn Barnes told him on Wednesday, May 29, 1985 [a few days before trial], that he could tell Miguel Suriano, if you saw him in the jailhouse that night, that Marilyn Barnes said he was lying, and as far as she was concerned, Suriano could get ready to go to trial, the Government just wasn't going to tolerate such nonsense."

Binker argues that this message intimidated Suriano into testifying against him at trial.

We initially observe that appellant never sought any relief at trial on the basis of this stipulated testimony or in respect to the matters thereby reflected. He did not move to strike Suriano's testimony or any of it, or request any jury instruction or move for a mistrial. A party should ordinarily not be allowed to gamble on the verdict. Appellant's complaint in this respect simply comes too late, unless the above-noted plain error standard is met. We hold that it is not.

[7, 8] We have held that substantial government interference with a defense witness' free and unhampered

choice to testify may violate the due process rights of the defendant and require reversal of the defendant's conviction without regard to prejudice. *United States v. Whittington,* 783 F.2d 1210, 1219 (5th Cir.1986); *United States v. Goodwin,* 625 F.2d 693, 703 (5th Cir.1980); *United States v. Hammond,* 598 F.2d 1008, 1012-13 (5th Cir.), *relief modified on reh'g,* 605 F.2d 862 (5th Cir.1979). However, the prosecutor's statements here were not made to a defense witness, but to a government witness who had agreed to testify pursuant to a plea agreement. The government must be permitted proper attempts to enforce its plea agreements, and in appropriate circumstances to inform its own witness that his plea agreement is in jeopardy. Here there is no suggestion that the government did not act in good faith. In addition, the government's statements here do not amount to the type of conduct that we have found to violate a defendant's due process rights. We have held that the "prosecutor's hands are not tied so tightly as to prevent good faith efforts to avert perjury." *Whittington,* 783 F.2d at 1219. The government did not engage in the type of intimidation that we have found objectionable in past cases. *See, e.g., Hammond,* 598 F.2d at 1012-14 (defense witness threatened during trial recess and subpoenaed before grand jury). We tend to the view that the government's message to Suriano was an entirely proper attempt to enforce the plea agreement. In any event, it is clear that the message was at least not an egregiously improper action in this respect, and did not violate Binker's due process rights so as to mandate reversal under the plain error rule.

Destruction of Evidence

Finally, Binker asserts that the district court erred in refusing to exclude any references to the marihuana

seized aboard the HARRY I, because the government destroyed this evidence prior to trial.[9] DEA Agent Putnoky, who took custody of the HARRY I when it arrived in Florida, testified at trial concerning the destruction of the evidence. The original indictment resulting from the arrest of those aboard the HARRY I was filed in the Southern District of Florida in July 1984. This indictment was dismissed in September 1984 at the request of the United States Attorney for the Eastern District of Louisiana in an effort to protect Rhodes' status as an informant. Binker was initially indicted and arrested in November 1984. Putnoky admitted that he was aware that there was a continuing investigation in Louisiana, but that he did not know that the investigation required retention of the marihuana seized aboard the HARRY I. Therefore, upon being informed of the dismissal of the Florida indictment, he ordered the destruction of the marihuana between January 24, 1985 and February 5, 1985. He explained that the destruction of the bulk evidence as well as the random samples sent to the DEA lab was a routine procedure whenever a case was dismissed. There is nothing to suggest that this explanation was other than entirely truthful.

On February 25, 1985, after the destruction of the evidence, Binker filed a pretrial motion to preserve evidence. The prosecution was informed of the destruction in April 1985, and immediately informed appellant's counsel. Appellant submitted a pretrial motion to exclude all refer-

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9. It is not clear whether appellant contests that marihuana was found aboard the HARRY I; he denied that he was aware of any marihuana aboard the vessel. The evidence is clear that marihuana was found on the HARRY I. There is absolutely no evidence that it did not have marihuana. Appellant's main argument is that the government's destruction of the evidence violated his due process right to a fundamentally fair trial.

ence to the alleged marihuana at trial, which the district court denied. Binker renewed his motion at trial, but the district court overruled the motion, finding that the government was not in bad faith in destroying the marihuana. The district court also denied Binker's motion for mistrial based on his objection that the court had improperly vouched for the credibility of DEA Agent Putnoky, but offered a curative instruction to the jury that they might or might not believe Putnoky's testimony concerning the circumstances of the destruction of the marihuana. The district court also admitted testimony by a DEA chemist that he had tested the chemical composition of the evidence and confirmed that it was marihuana.

[9] In *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), the Supreme Court held that the government is constitutionally required to preserve evidence that might be expected to play a significant role in the suspect's defense. *Id.* at 2534. Evidence meets this "standard of constitutional materiality" if it possessed an exculpatory value that was apparent before the evidence was destroyed, and if the defendant would be unable to obtain comparable evidence by other reasonably available means. *Id.* We have interpreted *Trombetta* to mean that "the mere possibility the evidence might aid the defense does not satisfy the constitutional materiality standard." *United States v. Webster*, 750 F.2d 307, 333 (5th Cir.1984), *cert. denied*, ... U.S. ....., 105 S.Ct. 2340, 85 L.Ed.2d 855 (1985). In this case, the DEA procedure for testing the chemical composition of the evidence seized "was sufficiently accurate to render nugatory the exculpatory value of preservation." *Id.* (footnote omitted); *see Trombetta*, 104 S.Ct. at 2534. In addition, Binker had alternative means for challenging the government's contention that there was marihuana aboard

the HARRY I. Binker had the opportunity to cross-examine all the witnesses who testified that the evidence seized aboard the HARRY I was marihuana, including the DEA chemist who testified about its chemical composition. *Trombetta*, 104 S.Ct. at 2535; *Webster*, 750 F.2d at 334. In light of the uncontradicted evidence offered by government witnesses that the HARRY I was carrying over one thousand pounds of marihuana when it was seized, we find that Binker has suffered no prejudice by the government's destruction of the evidence prior to trial. Furthermore, we find that the record supports the district court's determination that the government's destruction of the evidence was not in bad faith. *See Webster*, 750 F.2d at 333; *United States v. Herndon*, 536 F.2d 1027, 1029 (5th Cir.1976). Accordingly, we hold that the government's destruction of the evidence seized from the HARRY I did not violate Binker's due process rights.

Conclusion

Finding that none of appellant's contentions presents reversible error, we affirm his conviction.

AFFIRMED.